## INDEX TO APPENDIX


| | Page |
|---|---|
| Order of the District Court dated January 6, 1966 | 13 |
| Order of the District Court dated March 9, 1966 | 23 |
| Opinion of the Court of Appeals | 34 |
| Order Denying Rehearing | 42 |
| Order Staying Mandate | 42 |
| Judgment in Companion Action | 43 |

**United States District Court, D. South Carolina, Greenville Division**

**January 6, 1966.**

Declaratory Judgment action arising out of the collision in October, 1962, in Sumter County, South Carolina, when a large tractor-trailer unit crossed into the wrong side of the road and collided headon with an approaching passenger vehicle causing the death of one of the passengers and serious injuries to other occupants of such vehicle. The tractor and the trailer were owned by Forrester Trucking Company, Inc., sometimes hereinafter referred to as Forrester, a South Carolina corporation, and the tractor was driven at the time by its employee Sammie Burgess. Both the tractor and the trailer were used on the day of the accident in the delivery of tobacco by Vance Trucking Lines, Inc., sometimes hereinafter referred to as Vance, the use of the tractor being pursuant to a written lease between Vance as lessee and Forrester as lessor.

The principal point for determination in this action is the agency of Sammie Burgess, the driver. Each of the trucking companies contends that he was the agent of the other at the time of the collision. Counsel for the plaintiff in the wrongful death action and the other parties sustaining injuries contend that Sammie Burgess was the agent, or servant, of both.

A determination of the question of agency in this action will not only resolve questions of coverage but will be *res judicata* as to the same question in the death action now pending against both trucking companies and in other suits that may follow by the other persons injured in the collision, all of whom are made parties to this action. For this reason, the death action has been continued until this action is decided. It appears to be conceded that the liability for the wrongful death and personal injuries to third persons is clear. The question of damages, however, remains to be determined, and this should follow the determination in this action.

Depending upon the resolution of the question of agency, the interpretation of the respective contractual liabilities of Vance's insurer, Allstate Insurance Company,

and Forrester's insurer, Canal Insurance Company, must be made.

Forrester has limits of liability of $100/300,000, and Vance has liability limits of $300/500,00.[1] There is possibility that one or more of these claims may exceed one of these policy limits.

Vance and Forrester each disclaim legal liability for the actions of Sammie Burgess and seek to place the responsibility on the other. Each emphatically denies that it had control or dominion over Sammie Burgess. Taking the testimony and contentions of each at face value, the Court would have to conclude that Sammie Burgess was without any principal.

[1] The resolution of the factual determination must be made not merely from the written agreement between the parties, but also from the facts and circumstances surrounding their continuing relationship, as well as the facts and circumstances at the time of the traffic accident. *Tate v. Claussen-Lawrence Construction Co.*, 168 S. C. 481, 167 S. E. 826. See also *Hutson v. Herndon*, 243 S. C. 257, 133 S. E. (2d) 753, 756.

Vance is a licensed carrier operating under Interstate Commerce Commission authority. Forrester is an intrastate carrier licensed under the authority of the South Carolina Public Service Commission.

During the tobacco hauling season, it appears that Vance would enter into agreements with Forrester pursuant to which Forrester would make available to Vance tractor-trailer units with drivers. A written agreement dated July 15, 1962, is in evidence under which Forrester undertook to lease to Vance "vehicles listed in this agreement." The agreement does not list or describe any equipment, but the parties are in accord that the tractor involved in the accident was one of the units subject to the lease agreement. The trailer appears to have occupied a somewhat different status as will be discussed below.

While the drivers furnished by Forrester were engaged in hauling tobacco, they would clearly be under the control

[1] See the excellent note by Wilkins, Federal Civil Procedure—Discovery of Existence and Amount of Defendant's Insurance Policy, 17 S. C. Law Rev. 750 (1965).

of Vance and subject to the direction of Vance. At the end of a particular day's hauling, the driver of a Forrester truck could call Forrester for instructions or could return to the Vance terminal or could return to the Forrester terminal at Sumter. If a leased unit were returned to the Forrester terminal at Sumter, such unit and the driver could be used by Forrester in its own private business. The tractor involved in the collision was described as a "base unit" by a witness for Forrester who also said that Vance had priority as to this tractor since Forrester's hauling was slow during this period. On the other hand, it appears that any particular tractor-trailer unit and driver could be recalled by Forrester and another one substituted and, in fact, Sammie Burgess on October 3, 1962, the day preceding the accident, went on a trip with a load of cotton for Forrester.

Under the written lease, Vance and Forrester divided the gross revenues received by Vance for the hauling of tobacco on a 80/20 ratio, with Forrester receiving 80 per cent of the revenue and paying for gasoline and other expenses incident to the carrying of commodities.

It was frankly admitted and appears obvious that it was to the mutual interest of both Vance and Forrester to utilize the driver and tractor-trailer to a maximum as this would result in a maximum revenue to each of them. In other words, the lease arrangement between the parties was not one whereby the lessee was given exclusive custody of the leased property but rather was one whereby either the lessor or the lessee could use the property with both parties benefiting economically from the maximum use by the lessee.

It is also clear that the written lease did not cover the full arrangement between Vance and Forrester. There is no evidence that the trailer involved in the collision was subject to the lease. On the contrary, it appears to have been an extra trailer which Vance had been furnished by Forrester. Forrester likewise also furnished an extra tractor for use as a yard tractor and sent a man to Lake City just to load. The record is silent as to the agreement between Forrester and Vance respecting these matters. The officer who testified for Forrester knew of no agreement for

compensation for either the tractor or the trailer. The inference is clear that both parties cooperated fully toward the end that Vance would be able to handle and transport a maximum amount of tobacco with the resulting joint benefit to each company. The joint or common relationship between the parties is further demonstrated by the manner in which payments were handled. Although Forrester was liable under the lease agreement for payment of gas, as the matter was handled in actuality, gas purchases were made by Forrester and charged to Vance and paid by Vance. These payments were deducted by Vance from Forrester's share of the revenue. Furthermore, Vance collected for its transportation only upon receipt from Forrester of a bill lading bearing the receipt of the consignee. This was handled procedurally as follows:

> When a Forrester truck and driver made a delivery for Vance to a Vance customer, this customer would sign a receipted bill of lading and deliver it to the Forrester employee. He, in turn, would deliver this receipted bill of lading to Forrester who, in turn, would mail it to Vance. This was Forrester's only method of keeping an account of the revenues derived by its units. On some occasions, this receipted bill of lading would be returned to Vance directly, but would not be delivered to Vance until another receipt showing substantially the same information as the bill of lading was delivered by Vance to the Forrester driver.

Drivers' logs kept in compliance with the requirements of the Interstate Commerce Commission were likewise delivered by the drivers first to Forrester who relied upon the same for information for its records and who then transmitted the logs to Vance in accordance with its lease agreement.

When a Forrester driver would return to the Vance terminal at Lake City, he could be requested by Vance to make another delivery. If there was no further load available, the driver would be on his own to return to Sumter or would be free for the rest of the day. On some occasions, the drivers would leave their tractor-trailer in Lake City and go without it to Sumter. The yard tractor was available

for use and was used with the consent of Forrester for this purpose from time to time.

On the day of the fatal accident, Sammie Burgess had returned in the afternoon around 5 or 5:30 to the Vance terminal in Lake City, South Carolina. He had made a delivery of tobacco to Fairmont, North Carolina, and had in his possession the receipted bill of lading. This was toward the end of the tobacco season, and the dispatcher for Vance advised him that he did not have any further business for him. According to the dispatcher, Burgess was told that he could go in and that the dispatcher would get in touch with Mr. Forrester later. According to Sammie Burgess, the dispatcher said that he could go on into Sumter and that if he had another load, he would let Sammie's company know. At that time, Sammie Burgess was instructed by the Vance dispatcher to return to Forrester the extra trailer.

Sammie Burgess appears to have been paid by Forrester on a commission basis with extra compensation for nights when he "laid over" away from home.

[2] The collision occurred around 7:20 P. M. while Sammie Burgess was on the way from Lake City to Sumter. At the time of the accident, he was carrying the receipted bill of lading and also the Interstate Commerce Commission logs. This was clearly for the benefit of both parties. He was returning the spare trailer to Forrester. As mentioned before, there was no indication that this trailer was leased under the written agreement. In any event, the furnishing of the trailer by Forrester to Vance was obviously designed to serve their mutual benefit. There was no evidence as to the agreement for re-delivery of the trailer. In absence of agreement specifying the place of re-delivery, it has been held that where the parties reside a reasonable distance from each other, the property should be returned to the residence of the person furnishing the same. Whether this rule is applied or not, there would be an obligation on the part of Vance to keep the trailer in a reasonably safe and suitable place. 8 Am. Jur. (2d), Bailments, § 171. Thus, it was for the benefit of Vance that the trailer be returned at the earliest convenient time and this, of course, also bene-

fited Forrester in its further use of the trailer. It was also to Forrester's benefit that Sammie Burgess return to Sumter.

In *Jackson v. Blue,* 152 F. (2d) 67 (4th Cir. 1945), a truck had been leased with its driver for the purpose of hauling a bulldozer. It appeared that the lessor had agreed to purchase the bulldozer which was being hauled after the work of the lessee had been completed. At the time of the accident, the bulldozer was being delivered to one to whom the lessor had leased it in pursuance to his contract to purchase the machine. The Court said:

> "It is obvious that at the time of the accident the transportation of the bulldozer was being carried on both for the benefit of the Pool [lessee] in the performance of its obligation and for the benefit of Highway Equipment [lessor] in the delivery of the machinery to the new lessee * * *. [T]here was no error in the instruction to the jury that Highway Equipment should be held liable if they should find that to some extent it was in control of the driver of the tractor-trailer, and the evidence justified the finding that the journey * * * was the joint enterprise of Highway Equipment and the Pool, and that the driver was acting for both of them in taking the bulldozer to the place where it was needed." 152 F. (2d) at 71-72.

[3] The test of agency generally and in the State of South Carolina is said to be determined by deciding who has the right and authority to control and direct the particular work or undertaking, as to the manner or means of its accomplishment. *Hutson v. Herndon, supra; Brownlee v. Charleston Motor Express Co., Inc.,* 189 S. C. 204, 200 S. E. 819, 824.

Who then had the right to control Sammie Burgess? Again, this question cannot be discussed in a vacuum apart from practicality. Obviously, any agent driving a motor vehicle as soon as he is out of sight of the employer is not, as a practical matter, subject to his direction and control. The real question it seems in this case is, "To whom would Sammie Burgess respond if a direction had been given to him after he had left the terminal?" For example, suppose

that after he left the terminal, returning to Sumter, an employee of Vance had hastened after him with the request that he return to Lake City and make a late shipment. Under the lease arrangement between the parties and the relationship previously outlined, the conclusion is inescapable that Sammie Burgess would have acceded to this direction from Vance and returned to Lake City. On the other hand, suppose that an official of Forrester Trucking, having learned of Sammie Burgess's departure from Lake City, had hastened in his automobile to intercept him and had directed him to return to Lake City or any other point for the purpose of working for Forrester. Again, the conclusion is inescapable that Sammie Burgess would have acceded to this direction. Under the arrangement between the parties, this is not an unnatural result, but rather, a natural one. As a matter of fact, each would have the right to direct Sammie Burgess at this particular time of the day and the only possible conflict that could arise would be in the event of Forrester and Vance issuing contrary instructions to Sammie Burgess at the same time.[2] As Judge Williams noted in *Edwards v. Rogers*, 120 F. Supp. 499, 503 (E. D. S. C. 1954): "• • • [T]he dividing line between the existence of liability and immunity • • • ordinarily lies in the right of the employer to control the acts of the agent at the time the tort is committed."

The testimony of Forrester's officer, however, was that there was no conflict in the instructions to the drivers of the leased equipment, and the Court is not called upon to imagine a hypothetical situation where such conflict might occur in the face of clear evidence that Sammie Burgess acted for the mutual benefit of Vance and Forrester. See *Baur v. Calic*, 166 Md. 387, 399, 171 A. 713, 719; *Grasberger v. Liebert & Obert Corp.*, 335 Pa. 491, 6 A. (2d) 925, 122 A. L. R. 1201; *Keitz v. National Paving & Contracting Co.*, 214 Md. 479, 134 A. (2d) 296, 301, 136 A. (2d) 229; *Maryland Casualty Co. v. Sause*, 190 Md. 135, 57 A. (2d) 801, 804.

---

[2] Similar conflict was recognized long ago though on a different plane. Matt. 6:24. "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and despise the other."

[4-6] The principles respecting liability in this field are well summarized in *Siidekum v. Animal Rescue League*, 353 Pa. 408, 45 A. (2d) 59, 61, 62, as follows:

> By a continuous stream of authorities it has been declared that where one person lends his servant to another for a special employment the test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his general master or becomes subject to that of the party to whom he is lent or hired; the criteria is not whether the borrowing employer *in fact* exercises control but whether he has the *right* to exercise it. It is also well recognized that under some circumstances both the lender and the borrower may have control over the servant so as to render each of them liable for his conduct, for he may have been transferred to carry on work which is of mutual interest to them and to effect their common purpose, so that his service to the one does not involve abandonment of his service to the other. It is further established that, when different inferences can reasonably be drawn from the testimony as to whether the lender or the borrower is the controlling master at the time of the accident, or whether both of them have a right of control, the question is one for the jury." [Footnotes omitted.]

See also 56 C. J. S. Master and Servant § (2d)(2).

[7] The question here is for the Court to decide as there is no jury. In the case at hand, Sammie Burgess had not abandoned the service of Vance or his employer Forrester in making the trip from Lake City to Sumter. On the contrary, he continued to act for their mutual benefit and was subject to their joint control.

Great stress is laid by Forrester on the fact that a Vance decal was on the tractor at the time of the accident. This decal read as follows:

> "Operated by
> Vance Trucking Company
> Henderson, N. C.
> I. C. C. No. 93980
> N. C. No. 56"

Under 49 U. S. C., Section 304(e), the Interstate Commerce Commission is authorized to prescribe regulations governing the use of leased vehicles with exceptions being made by Subparagraph (f) denying the right to regulate the duration of any such lease or the amount of compensation to be paid for the use of the leased vehicle. Regulations have been promulgated under the authority of this section which, among other things, require a lessee to remove any legend or device showing it as the operating carrier before relinquishing possession of leased equipment. These regulations also require the lessee to secure from the owner of the leased equipment, or someone authorized to act for the owner, a receipt specifically identifying the equipment and stating therein the date and the time of day possession of such leased equipment was taken by the owner from the authorized carrier. *Ex Parte* No. MC-43, Title 49, Federal Register, Section 207. At the time of the accident in this case, no such receipt had been secured by Vance.

Section 304 of the Act mentioned above authorizes such regulations as are reasonably necessary to assure that the lessee will have full direction and control of leased vehicles and will be fully responsible for the operation thereof while they are being so used. Under Section 207 of the regulations mentioned above, the lease must provide for the exclusive possession, control, and use of the equipment, and for the complete assumption of responsibility in respect thereto, by the lessee for the duration of the lease, and such duration is required to be made specific in the lease and to coincide with the time for the giving of receipts for the equipment as required in the regulations, both at the beginning and end of the lease arrangement.

The lease between Vance and Forrester has no provision respecting exclusive possession, control and use or for the assumption of responsibility. With respect to duration, the lease provides that it is to remain in force until cancelled or superseded by another lease and that its terms and conditions apply only whenever lessor's vehicle is actually in the service of the lessee.

[8, 9] The failure to include the lease provisions required by the regulations in the particulars just mentioned

would certainly not excuse Vance from any responsibility it might otherwise have for the actions of the driver of the tractor-trailer; and, on the other hand, the responsibility of Vance would not serve to release Forrester if, in fact at the time of the collision in question Forrester also held a joint right of control over Sammie Burgess.

[10, 11] Vance contends that it is free from the duty to comply with the regulations because it was hauling "an exempt commodity." As mentioned before, the Interstate Commerce Commission may not regulate the duration of the lease of any vehicle or the amount of compensation to be paid for its use when it is engaged in hauling so-called exempt commodities referred to in 49 U. S. C. § 304 (f). Except for these two exceptions, however, all of the regulations governing the use of leased vehicles are applicable without regard to the commodity being hauled. The Interstate Commerce Act and the regulations issued thereunder obviously are not designed to excuse a party from liability which he might otherwise have. Thus, a determination that Vance is responsible under the Act and regulations does not preclude a finding that Forrester was also responsible. The fact that no receipt had been taken for the possession of the Vehicle at the time of the collision and the fact that the Vance decals were still upon the tractor are matters to be considered in an overall consideration of the relationship between the parties. A decision based on a consideration of all relevant factors that Sammie Burgess was the agent of both Vance and Forrester makes it unnecessary to consider whether Vance in any event would be responsible solely because of the Interstate Commerce Act and regulations.

The question of "proportionate pecuniary responsibility" was not argued so no decision is being made thereabout. However, the parties are not foreclosed from presenting this issue at a later time should they be so advised.

The Clerk will enter Judgment reflecting that both Vance and Forrester, and their insurers, must defend in the tort action which precipitated this controversy. Liability rest upon both.

And it is so ordered.

## United States District Court, D. South Carolina, Greenville Division

### March 9, 1966.

Plaintiff and defendant insurance companies, by cross motions and oppositions to same, seek this forum's decision as to their individual or collective obligations to their named insured and others. The determination is whether coverage is properly classified as primary and secondary—excess, or concurrent and *pro rata*. Allstate insists that Canal has primary responsibility protecting both Vance, Allstate's insured, and Forrester, Canal's named insured. Canal urges *pro rata* responsibility. Each relies on policy inclusions and exclusions of both as dissected together and separately.

This Court's review was had on December 8 and 9, 1965, in a declaratory action arising out of an automobile-truck collision in October, 1962, in Sumter County, South Carolina. Crucial to decision was determination of the agency of the driver of the truck, each of two trucking companies, Vance Trucking Lines and Forrester Trucking Company, contending that the driver was the agent and servant of the other at and before the time and place of the collision. This Court's order held that Vance and Forrester both had supervision of the driver at the time of the accident, that both were therefore liable. This order decided that both Allstate and Canal, insurers for Vance and Forrester respectively, would have to defend tort actions arising out of the accident. The question of the pecuniary responsibility of Allstate and/or Canal was not an issue then.

Subsequent to initial determinations, both Allstate and Canal filed motions [1] to have the order amended to declare the rights, duties, obligations and legal relations of the parties under the respective terms of their policies, especially as relates to pecuniary responsibility. Allstate has asked the court to find that its policy, issued to Vance, does

[1] Rule 59(e) Federal Rules of Civil Procedure was pursued (by agreement and by stipulation) which reads:

> Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

not extend coverage to Burgess, the driver, or Forrester, but that the policy of Canal provides coverage to Vance, Forrester and the driver. Canal asks that the court determine the proportionate pecuniary responsibility of the insurers in relation to their respective coverages and the factual determinations heretofore made by the court. The matter is before the court under Rule 59(e), Federal Rules of Civil Procedure, but, aside from that, the parties have stipulated that it is properly before the court.

Basically, this is a controversy between two insurance companies over their related, or unrelated, obligations to their named insureds and others. In other words, is the coverage of one company primary and the other secondary and excess, or are the coverages concurrent and *pro rata*? Allstate submits that Canal's coverage is primary and protects Vance, Allstate's named insured, Forrester, Canal's named insured, and Burgess, the driver. Canal urges *pro rata* liability in asking the court to determine the "proportionate" responsibility of the parties. Both companies rely upon varying policy inclusions and exclusions in an effort to obtain the desired result.

[1–3] Policy construction is imperative here since parties may contract to extend or limit insurance liability risks as they see fit. Thus, the issue here—the coverage of liability insurance—must be determined from the contractual intent and objectives of the parties as expressed in their policies and applicable endorsements. *Fidelity & Cas. Co. of New York v. Reece,* 223 F. (2d) 114 (10th Cir. 1955); 7 Appleman, Insurance Law & Practice, section 7481; 45 C. J. S. Insurance §§ 827 and 829. The extent or limit of risks if unambiguous, must be taken in their ordinary and popular sense, and an insurer may not be compelled to assume liability which cannot be clearly said to be *within a fair* and reasonable interpretation of the contract. *Fidelity & Cas. Co. of New York v. Reece,* 223 F. (2d) 114 (10th Cir. 1955); *Farm Bureau Mut. Auto. Ins. Co. v. Daniel,* 104 F. (2d) 477 (4th Cir. 1939). The contentions of Allstate and Canal regarding their policies must be examined in this light.

Allstate would first focus all attention upon Canal's obligations but, while there may be no doubt about these obligations, the court cannot construe Canal's policy and delineate the obligations therein, without being simultaneously aware of Allstate's policy and the obligations there. It is not practical to consider either policy alone for it is apparent that both policies were written with the express thought that other insurance might be involved.

In attempting to provide for a comprehensive policy, it is a common practice to include extended coverage clauses in automobile liability insurance contracts. Because of this, duplications of coverage would often be found were it not for the further practice of setting forth exclusions to coverage. Such exclusions or limitations may take many forms and may be found in the body of the policy or in endorsements. Regardless of where they are posited, however, these exclusions and limitations have led to a substantial body of jurisprudence. See, *e. g.*, Annot., 76 A. L. R. (2d) 502; 7 Am. Jur. (2d) Automobile Insurance, section 202 (1963); 8 Appleman, Insurance Law & Practice, sections 4911, *et seq.*

Here, both Allstate and Canal have rather comprehensive policies and both seek to limit particular coverages by exclusions. The extent to which reliance is placed upon an exclusion is shown by the fact that both Allstate and Canal assert a particular exclusion as a basis for denying coverage to one person or company or another Allstate relies completely on its exclusionary endorsement 14B-1 to deny coverage to Forrester and the driver. The endorsement, in part, provides:

> With respect to the insurance for Bodily Injury Liability and for Property Damage Liability the unqualified word 'insured' includes the named insured and also includes any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission. The insurance with respect to any person or organization other than the named insured does not apply:

(a) except with respect to an employee of the named insured, to any person or organization, or to any agent or employee thereof, engaged in the business of transporting property by automobile for the named insured or for others (1) unless the accident occurs while such automobile is being used exclusively in the business of the named insured and over a route the named insured is authorized to serve by federal or public authority.

* * *

Provided, however, a driver or other person furnished to the named insured with an automobile hired by the named insured shall not be deemed an employee of the named insured;

* * *

(d) with respect to any hired automobile, to the owner * * * of such automobile, or to any agent or employee of such owner * * *, if the accident occurs (1) while such automobile is not being used exclusively in the business of the named insured * * *.

Other Insurance—Coverage A and B: If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectable insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectable insurance.

Canal places no less reliance on its E-45 endorsement to deny coverage to Vance. Its endorsement provides:

In consideration of the premium charged for the policy to which this endorsement is attached, it is understood and agreed that no coverage is extended to any person, firm or organization using the described automobile pursuant to any lease, contract of hire,

bailment, rental agreement, or any similar contract or agreement either written or oral, expressed or implied, the terms and provisions of the Insuring Agreement III, entitled 'Definition of Insured' notwithstanding.

In the event the automobile described in this policy is being used or maintained pursuant to any lease, contract of hire, bailment, rental agreement or any similar contract or agreement, either written or oral, expressed or implied, the insurance afforded the named insured shall be excess insurance over any other insurance.

Allstate urges that because of the 14B-1 endorsement its policy offers no protection to Forrest or the driver since the court has already found that the truck was not exclusively about the business of Vance. Unquestionably, the exclusion serves its purpose here. Forrester and Burgess are not covered under Allstate's policy.

Conversely, Canal urges that because of the E-45 endorsement its policy affords no protection to Vance or the driver. Again, unquestionably, this exclusion serves its purpose. Vance and Burgess are not covered under Canal's policy.

[4] The controversy thus resolves itself to this: Allstate's policy protects Vance and Canal's policy protects Forrester. To escape this determination Allstate submits that the operation of the vehicle was not pursuant to the lease and, therefore, the E-45 exclusionary endorsement of the Canal policy would not operate to exclude from coverage "any person, firm or organization using the described automobile * * *." The Canal policy would then provide coverage for Vance and Burgess as well as Forrester, and the "other insurance" clause of the Allstate policy would then be of effect. That contention, however, is without merit. The order of this court which determined the relationship of parties drew no such conclusion. The lease was but one of several factors, but definitely not *the* controlling one, considered in that determination, but insomuch as the operation of the vehicle was of benefit to Vance it was obviously pursuant to the lease. In fact, the lease set forth the terms and methods of compensation and other matters

incident to the operation. That these provisions were in force and being followed is not questioned. It is the fact of the lease arrangement which created the concurrent responsibility, at a particular time and place, which so pervades this controversy. Moreover, the situation at hand, by any name, would clearly fall within the broad classifications contained in the endorsement.

There is no reasonable, plain and ordinary interpretation which may be applied to either policy to justify a finding that either insurer owes protection to anyone other than its named insured. This is not a case in which conflicting "other insurance" clauses are to be resolved. In those cases the controversy most often arises where there is a duplication of coverage. Where one party is covered by two insurance policies the conflict is usually resolved by a finding that one policy provides primary coverage and the other secondary coverage. The principles usually used in resolving these conflicts of "other insurance" clauses are summarized at 7 Am. Jur. (2d), Automobile Insurance, section 202 (1963):

> Many cases have arisen involving conflicts between insurance policies both of which purport to restrict or escape liability for a particular risk in the event that there is other insurance. Such conflicts have arisen, under automobile liability policies covering the same risk, in the following situations: (1) where one of the policies contains an 'excess insurance' clause and the other contains a '*pro rata*' clause; (2) where one of the policies contains an 'excess insurance' clause and the other a 'no liability' clause; (3) where both of the policies contains an 'excess insurance' clause; (4) where one of the policies contains a '*pro rata*' clause and the other contains a 'no liability' clause; and (5) where a 'no liability' clause expressly designates the types of insurance with which it might conflict.

That treatise further states that in the first situation the majority prefers the "excess" clause over the "*pro rata*" clause; that in the third situation *pro rata* contribution is generally required; that in the fourth situation the "no liability" clause is preferred over the "*pro rata*" clause;

and in the fifth situation the "no liability" clause is preferred over the "excess" clause. Such rules as these, formulated in the hopeful quest of some logical reconciliation, have been characterized as "pursuing a will o' the wisp," *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Or. 110, 341 P. (2d) 110, 346 P. (2d) 643, 76 A. L. R. (2d) 485 (1959), and have been rejected by many courts as a futile exercise.

> There reasoning appears to us completely circular, depending, as it were, on which policy one happens to read first. Other cases seem to recognize the truth of the matter, namely, that the problem is little different from that involved in deciding which came first, the hen or the egg. *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F. (2d) 958, 960 (9th Cir. 1952).

One thing is apparent, the jurisprudence is multitudinous, multifarious and, in many respects, oppressive. A general rule can only be found within a particular category, and there are contrary opinions in each category. It is no mean task to undertake a review of the jurisprudence, for each circumstance had received extensive treatment and, because factual situations are rarely exact in comparison, legal guidelines are barely discernible.[2]

This situation has led a growing number of courts to decline to attempt a reconciliation. Rather than pursuing the "will o' the wisp," circular reasoning, or the attempt to resolve the hopeless, these courts have rejected the conflicting "other insurance" clauses *in toto* as being mutually re-

---

[2] See commentaries corresponding to the American Jurisprudence categorization at Annot., 76 A. L. R. (2d) 502 (1961); Annot., 46 A. L. R. (2d) 1163, 1165 (1956); Annot., 69 A. L. R. (2d) 1122 (1960); 46 A. L. R. (2d) 1163, 1167; 46 A. L. R. (2d) 1163, 1168, which, with later case supplementation, highlights the expansiveness of the problem.

[3] See, e. g., Liberty Universal Ins. Co. v. National Sur. Co., 338 F. 2d 988 (5th Cir. 1964); Gilkey v. Andrew Weir Ins. Co. 291 F. 2d 132 (9th Cir. 1961); Citizens Mut. Auto. Ins. Co. v. Fireman's Fund Ins. Co., 234 F. Supp. 931 (W. D. Mich. 1964); Allstate Ins. Co. v. Atlantic Nat'l Ins. Co., 202 F. Supp. 85 (S. D. W Va. 1962; Maryland Cas. Co. v. Continental Cas. Co., 189 F. Supp. 764 (N. D. W. Va. 1960); New Amsterdam Cas. Co. v. Certain Underwriters, 56 Ill. App. 2d 224, 205 N. E. 2d 735 (1965); Iowa Nat'l Mut. Ins. Co. v. Fidelity & Cas. Co. of New York, 62 Ill. App. 2d 297, 210 N. E. 2d 662 (1965); Farmers Ins. Exchange v. Fidelity & Cas. Co. of New York, 374 P. 2d 754 (Wyo. 1962).

pugnant, and have required proportionate, or *pro rata* responsibility. From a numerical, if not a jurisdictional, standpoint more recent cases have reached this result.[8]

The rule expressed in these cases has had its greatest following in Oregon and in decisions rendered by the Ninth Circuit based on Oregon law. Many of these cases have involved the situation in which one person was driving another's car and the ensuing conflict was between the insurers of the owner and the driver. See, *e. g.*, *Travelers Ins. Co. v. Peerless Ins. Co.*, 287 F. (2d) 742 (9th Cir. 1965); *General Accident Fire & Life Assur. Corp., Ltd. v. Continental Cas. Co.*, 287 F. (2d) 464 (9th Cir. 1961); *Oregon Auto. Ins. Co. v. United States Fidelity & Guar. Co.*, 195 F. (2d) 958 (9th Cir. 1952); *Lamb-Weston, Inc. v. Oregon Auto. Ins. Co.*, 219 Or. 110, 341 P. (2d) 110, 346 P. (2d) 643, 76 A. L. R. (2d) 485 (1959).

Although the rule may have been regarded as an Oregon rule, a review of the cases will reveal that it has been applied with increasing momentum in other jurisdictions as well. See *Continental Cas. Co. v. St. Paul Mercury Fire & Marine Ins. Co.*, 163 F. Supp. 325 (S. D. Fla. 1958); *Continental Cas. Co. v. Weeks*, 74 So. (2d) 367, 46 A. L. R. (2d) 1159 (Fla. 1954); *Continental Cas. Co. v. New Amsterdam Cas. Co.*, 28 Ill. App. (2d) 489, 171 N. E. (2d) 406 (1960); *New Amsterdam Cas. Co. v. Certain Underwriters*, 56 Ill. App. (2d) 224, 205 N. E. (2d) (1965); *Iowa Nat'l Mut. Ins. Co. v. Fidelity & Cas. Co.*, 62 Ill. App. (2d) 297, 210 N. E. (2d) 622 (1965); *Reetz v. Werch*, 8 Wis. (2d) 388, 98 N. W. (2d) 924 (1952); *Farmers Ins. Exchange v. Fidelity & Cas. Co.*, 374 P. (2d) 754 (Wyo. 1962). The rule has also been applied in the lessor-lessee situation. See *Liberty Universal Ins. Co. v. National Surety Co.*, 338 F. (2d) 988 (5th Cir. 1964); *Gilkey v. Andrew Weir Ins. Co.*, 291 F. (2d) 132 (9th Cir. 1961); *Citizens Mut. Auto. Ins. Co. v. Fireman's Fund Ins. Co.*, 234 F. Supp. 931 (W. D. Mich. 1964); *Allstate Ins. Co. v. Atlantic Nat'l Ins. Co.*, 202 F. Supp 85 (S. D. W. Va. 1962); *Arditi v. Massachusetts Bonding & Ins. Co.*, 315 S. W. (2d) 736 (Mo. 1958); *Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co.*, 28 N. J. 554, 147 A. (2d) 529, 69 A. L. R. (2d) 1115 (1959).

The problems of "other insurance" are but an enlightening adversion here, however, for we are not faced with such a problem. The applicable endorsements effectively negate duplicated coverage. Neither trucking company can claim coverage under any policy other than that in which it is the named insured. We have two separate lines of coverage which, in this instance, happen to reach a single act. There is a duality of coverage without a duplication. Each trucking company is concurrently liable and each must look to his own insurer. It follows that the measure of each insurer's response must be proportional to the amount of coverage each has provided. It does not appear that a factual situation sufficiently analogous to lend guidance has been decided by the courts, but, ultimately, the situation is not wholly dissimilar to the "other insurance" situation, and the result would be no different had there been a true duplication of coverage. By what is perhaps the majority view neither of the two "excess" clauses would be preferred and there would be required a proration. By the so called "Oregon" rule both clauses would be nullified and proration required. There is no other rational basis of application than a *pro rata* response.

Allstate has submitted several cases for consideration apparently with the thought that these cases are dispositive of the controversy here. However, an examination of the cases will show that they are not factually similar or are expressive of the supposed general rule in conflicting "other insurance" cases. Allstate urges a consideration of *American Surety Co. of New York v. Canal Ins. Co.*, 258 F. (2d) 934 (4th Cir. 1958), where an "excess" clause was given effect. In that case a lessee of a truck was covered as a named insured under American's policy and as an omnibus insured under Canal's policy. The American policy provided that it would furnish excess coverage as to hired vehicles. A similar Canal provision was to the effect that the policy would provide *pro rata* contribution if there were other insurance, with a proviso, however, that with respect to "temporary substitute automobiles" or "other automobiles" it would furnish only excess coverage.[4] This provision was

[4] See American Surety Co. of New York v. Canal Ins. Co., 157 F. Supp. 386, 389 (W. D. S. C. 1957) rev'd 258 F. (2d) 934 (4th Cir. 1958).

held not applicable because as to Canal's named insured the truck was neither a "temporary substitute" nor an "other automobile." The excess clause of the American policy could be given effect without invalidating the *pro rata* contribution clause in the Canal policy because the *pro rata* clause could operate in those situations where the other insurance was not excess. As the case is readily distinguishable on its facts from the present controversy it is not deemed controlling here.

Likewise not applicable is *Carolina Cas. Ins. Co. v. Pennsylvania Thres. & Farmers' Mut. Ins. Co.*, 327 F. (2d) 324 (3rd Cir. 1964). There, Allison, an ICC carrier, owned certain vehicles and was insured by P.T. & F. Kuhn Transportation Company, also an ICC carrier, owned certain vehicles and was insured by Carolina. The facts leading to a coverage controversy were that Allison, who had about half a load, called Kuhn to ask if he had anything to be delivered in the same area as Allison's goods. There was no written lease of the vehicle to Kuhn and, though Kuhn had leased in the past from Allison, the testimony was that this was a different arrangement. The driver, an employee of Allison, testified that he obtained all of his instructions from Allison. After an accident occurred, P. T. & F. asserted that Carolina, Kuhn's insurer, had primary coverage because there was an oral lease of the vehicle and because Kuhn was required by the Pennsylvania Utility Commission to stand liable to the public. The district court found that there was no lease agreement and that Kuhn had simply hired Allison to haul certain goods to two customers.

The policies of both P. T. & F. and Carolina were identical and each contained identical endorsements of the 14B-1 type which Allstate has here. The driver was specifically excepted from P. T. & F.'s exclusion since it provided, as does Allstate's here, that "a) except with respect to an employee of the named insured," no insurance is afforded any other person or organization. Aside from that, however, the exclusionary endorsement would not have helped P. T. & F. because under the terms of the endorsement, it only applied where *another* person or organization was "engaged in the business of transporting property by automo-

bile for the named insured." Kuhn was not transporting property for Allison. Thus, as the Third Circuit held, Carolina's exclusion applied but P. T. & F's did not, and P. T. & F. was therefore held primary. In this respect, the decision is not unlike that of the Fourth Circuit in *American Surety Co. of New York v. Canal Ins. Co.*

Allstate also refers to cases cited in the *Carolina* case and thereby urges consideration of these as support. There are five cases cited in the *Carolina* decision, including *American Surety Co. of New York v. Canal Ins. Co.* which has already been considered, but none of these is determinative of the case here. In *Nationwide Mutual Ins. Co. v. Fidelity & Cas. Co.*, 188 F. Supp. 377 (W. D. Pa. 1960) rev'd 286 F. (2d) 91 (3rd Cir. 1961), a case in which three insurers were involved, all with similar "other insurance" clauses, the district court merely held that, under the varied facts of the case, it could not hold that Nationwide should be absolved. The court expressed no opinion on whether or not Nationwide might eventually get out. In reversing this decision, the Third Circuit held that the district court should have refused to entertain the action initially and that it was error to have directed Nationwide to defend. The other cases, expressly stating the Pennsylvania rule, do no more than follow the supposed general rule for resolving conflicting "other insurance" clauses.

The cases advanced are not factually or legally apposite, nor are they inconsistent with *pro rata* apportionment here. Allstate and Canal are liable concurrently and in proportion to the amount of insurance provided by each. Since, as to one person, the Allstate policy provides coverage to the limit of $500,000.00 and the Canal policy provides coverage to the limit of $100,000.00, Allstate must bear pecuniary responsibility of five-sixths and Canal must bear one-sixth of the amount of any judgment suffered, with the proration to be applied in like manner to the expense of defending the suits.

And it is so ordered.

## OPINION OF THE COURT OF APPEALS

May 7, 1968.

BOREMAN, Circuit Judge:

Different phases of this litigation have heretofore been in the federal courts. The case was here once before on a question not now involved in this appeal and was remanded to the district court for further proceedings.[1] On remand the district court made necessary findings of fact and stated its conclusion that both Vance Trucking Company (Vance) and Forrester Trucking Company (Forester), and their insurers, must defend in a tort action in the district court which precipitated this controversy.[2] Since the district court there stated the facts in detail it is unnecessary to restate them fully here. However, a very short statement of undisputed facts is included herein in order to acquaint the reader with the general nature of the litigation.

At all times pertinent hereto Forrester was a licensed trucking company with an office and a terminal at Sumter, South Carolina, and was engaged primarily in hauling with its own motor vehicles certain commodities within South Carolina under authority of the South Carolina Public Service Commission. During slack seasons Forrester leased vehicles to Vance for use in interstate hauling, Vance being licensed to operate interstate under authority of the Interstate Commerce Commission. Vance had its main office at Henderson, North Carolina, and maintained a terminal and dispatcher at Lake City, South Carolina. Forrester was the named insured in a liability policy issued by Canal Insurance Company (Canal) with limits of $100/$300,000. Vance was the named insured in a liability policy issued by Allstate Insurance Company (Allstate) with limits of $500/$500,000.

During the summer of 1962 Vance and Forrester entered into a lease agreement whereby Forrester was to furnish tractor-trailer trucks and drivers to Vance for its use in hauling commodities for Vance's own customers. The leased vehicles operated primarily out of Vance's

[1] Vance Trucking Company v. Canal Insurance Company, 338 F. 2d 943 (4 Cir. 1964).

[2] Vance Trucking Company v. Canal Insurance Company, 249 F. Supp. 33 (D. S. C. 1966).

terminal at Lake City with drivers furnished by Forrester and who were approved by Vance according to the terms of the lease agreement.

Sammie Burgess, an uneducated Negro then fifty years old, was one of Forrester's drivers. On October 3, 1962, Vance's dispatcher in Lake City called Forrester's office and asked that a driver be sent to the terminal the following morning to transport a load of tobacco to Fairmont, North Carolina. Pursuant to this request Burgess, who had been driving the leased vehicles for Vance on other occasions, reported to the dispatcher, picked up a loaded tractor-trailer unit which was already in Lake City. After delivering the cargo in Fairmont, Burgess returned to Lake City and was instructed by Vance's dispatcher to take the tractor and an empty trailer to Forrester at Sumter. On the way to Sumter the vehicle operated by Burgess was involved in an accident in which Mrs. Barbara Carson was killed and her husband and four children were injured.

Upon consideration of all the facts and circumstances the district court determined that, at the time of the accident, Burgess was then and there the agent and servant of both Vance and Forrester; that both Vance and Forrester were responsible for the acts of Burgess; and that Vance and Forrester, and their insurers, must defend in tort actions brought on behalf of the Carsons.[3] The question of "proportionate pecuniary responsibility" had not been presented and the court rendered no decision with respect thereto at that stage of the proceedings. Since we conclude that the factual findings are supported by substantial evidence we cannot say that they are clearly erroneous. Permissible inferences and conclusions were drawn from the facts as found and we affirm that portion of the decision below as reported at 249 F. Supp. 33.

Subsequent to the initial determination with respect to the tort liability of Vance and Forrester the plaintiffs, Vance and Allstate, and the defendants, Forrester and Canal, moved that the order and judgment of the district court be supplemented, altered or amended by determining the questions of insurance coverage. Thereafter the dis-

[3] 249 F. Supp. 33, cited n. 2 *supra*.

trict court held that Allstate was pecuniarily responsible for five-sixths of the amount of any judgments obtained by the Carsons growing out of the accident, and that Canal would be pecuniarily responsible for one-sixth of the amount of any such judgments. *Vance Trucking Company v. Canal Insurance Company,* 251 F. Supp. 93, (D. S. C. 1966).

Assuming, *arguendo,* the correctness of the district court's determination that both Vance and Forrester were responsible for the acts of Burgess, Allstate contends that Canal's coverage is primary and protects Allstate's named insured (Vance), Canal's named insured (Forrester), and Burgess, the driver. Canal urges pro rata liability in asking for a determination of "proportionate" pecuniary responsibility of the parties. Both Allstate and Canal rely upon various policy provisions, inclusions and exclusions, in an effort to support their contentions.

The district court stated that a construction of the insurance policies was necessary and that the issue as to the liability coverage must be determined from the contractual intent and objective of the parties as expressed in their policies and applicable endorsements. The court concluded that by reason of the respective policy provisions neither policy covered Burgess at the time of the accident.

Allstate's endorsement 14-B provides that the policy does not apply to persons, their agents or employees, engaged in transporting property for Vance "unless the accident occurs while such automobile is being used exclusively in the business of the named insured." The "other insurance" clause in the Allstate policy provides that if the insured, Vance, had "other insurance against a loss covered by this policy the Company [Allstate] shall not be liable under the policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to temporary substitute automobiles under Insuring Agreement IV or other automobiles under Insuring Agreement V shall be excess insurance over any other valid and collectible insurance."

The district court found that the vehicle involved in the accident was not being used *exclusively* in the business of Vance, Allstate's named insured, and that neither Burgess nor Forrester was covered by the Allstate policy.

Canal's policy, in which Forrester is named insured, contains an exclusion clause which provides that no coverage is extended to "any person, firm or organization using the described automobile pursuant to any lease, contract of hire, bailment, rental agreement, or any similar contract or agreement either written or oral, expressed or implied." This policy further provides that when the automobile described therein is being used pursuant to a lease "the insurance afforded the named insured [Forrester] shall be excess insurance over any other insurance." The court found that Burgess was operating the accident vehicle pursuant to the lease agreement and, consequently neither Burgess nor Vance was covered by the Canal policy.

At 251 F. Supp. 93, 96, the court stated:

> "There is no reasonable, plain and ordinary interpretation which may be applied to either policy to justify a finding that either insurer owes protection to anyone other than its named insured. This is not a case in which conflicting 'other insurance' clauses are to be resolved. In those cases the controversy most often arises where there is a duplication of coverage."

Following an extended discussion of "other insurance" policy provision, the court continued:

> "The problems of 'other insurance' are but an enlightening adversion here, however, for we are not faced with such a problem. The applicable endorsements effectively negate duplicated coverage. Neither trucking company can claim coverage under any policy other than that in which it is the named insured. We have two separate lines of coverage which, in this instance, happen to reach a single act. There is a duality of coverage without a duplication. Each trucking company is concurrently liable and each must look to his own insurer. It follows that the measure of each insurer's response must be proportional to the amount of

coverage each has provided. It does not appear that a factual situation sufficiently analogous to lend guidance has been decided by the courts, but, ultimately, the situation is not wholly dissimilar to the 'other insurance' situation, and the result would be no different had there been a true duplication of coverage. By what is perhaps the majority view neither of the two 'excess' clause would be preferred and there would be required a proration. * * *. There is no other rational basis of application than a pro rata response." 251 F. Supp. at 98.

The district court considered several cases which had been cited by Allstate as providing the answer to the controversy here. Upon analysis the court found those cases distinguishable, inapposite, and dispositively unpersuasive.

Further assuming, *arguendo*, on this appeal that Forrester and Vance are liable to the third parties involved in the accident and that Burgess was not covered by either policy, Allstate contends that the liability of both insurance companies sounds in contract rather than tort. It then points to a decision of the Supreme Court of South Carolina, which was handed down only a few days before the district court's decision as to proportionate pecuniary responsibility, which was not considered by the district court. The South Carolina case is *Galloway v. Southern Farm Bureau Ins. Co.*, 247 S. C. 288, 147 S. E. 2d 271 (March 1, 1966). Allstate urges that the *Galloway* case supports its contention that the prorating of the liability of the insurance companies in the circumstances here is error. That case involved a suit by Galloway, a passenger in a vehicle owned by L. C. Tolson, which was in possession of the owner's son, Darrell Tolson, with his father's consent. In turn, Darrell Tolson permitted Reymond Wilkes to drive and while the latter was negligently operating the vehicle it was involved in an accident resulting in injury to Galloway. Galloway was paid $10,000, the limit under the L. C. Tolson policy which covered the particular vehicle. He obtained a $100,000 judgment against Raymond Wilkes. At the time of the accident there were in force two policies of automobile liability insurance that had been issued by

Southern Farm Bureau Insurance Company to Raymond Wilkes' father, C. A. Wilkes. The policies were identical in form. One policy covered a 1958 Ford sedan and the second policy covered a 1953 Chevrolet truck, both vehicles being owned by C A. Wilkes, and the liability under each policy was limited to $10,000 for injury to any one person and $20,000 for each accident. Galloway obtained a judgment against the said insurance company on the policy covering the 1958 Ford, which judgment was paid with interest. Galloway then brought an action against the insurer for $10,000 and obtained a judgment for that amount under the policy covering the Chevrolet truck to be applied against the $100,000 judgment against Raymond Wilkes.

The insurance company appealed and the judgment was affirmed. The controversy on appeal in *Galloway* concerned a clause as to "other insurance" contained in the policy upon which the second $10,000 judgment was obtained. This clause provided that if the insured, C. A. Wilkes, had "other insurance" against a loss covered by the policy the insurer "shall not be liable under this policy for a greater portion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; **provided, however, the insurance with respect to * * * other automobiles shall be excess insurance over any other valid and collectible insurance.**" (Emphasis supplied.)

In *Galloway,* the insurance company contended that since the insured, C. A. Wilkes, had other insurance (the policy covering the 1958 Ford) against the loss, the insurer's liability under the Chevrolet policy had been discharged by the payment of the $10,000 judgment on the Ford policy. The court observed that this contention obviously was based upon the unsound premise that the "loss" to which the two policies were applicable did not exceed $10,000. Galloway contended that the insurer's liability here is controlled by the proviso appearing at the end of the "other insurance" clause. The South Carolina court held that the quoted proviso was not ambiguous, and was clearly applicable. "The loss to which the policy is applicable, *i.e.,* the

plaintiff's judgment in the amount of $100,000.00, exceeds the amount of all other insurance against such loss; the driver of the automobile, whose recklessness caused the loss, was an 'insured' under the policy; the driver was operating an automobile other than that of the named insured, C. A. Wilkes, described in the policy, and by the plain language of the proviso relating to such other automobiles the coverage is 'excess insurance.'" 147 S. E. 2d at 273.

Having reached a decision, the court extended its discussion and Allstate points to the following quotation as particularly apposite to the instant case. It was stated, 147 S. E. 2d at 273:

> "Appellant [insurer] may not, and indeed does not, invoke the pro-rata provision of the 'other insurance.' clauses *with respect to Tolson's policy,* because that policy was the primary coverage and liability thereunder was not on a parity with liability under appellants' policy, which was excess insurance, was not identical in scope with the former, and did not come into operation until the former had been exhausted. *Co-insurance of the same risk is prerequisite to the right of contribution among insurers.*'" (Emphasis supplied.)

The only South Carolina case cited in support of the italicized portion of the foregoing quotation is the case of *Laurens Federal Savings & L. Ass'n, v. Home Ins. Co. of New York,* 242 S. C. 226, 227, 130 S. E. 2d 558. In view of the statement that the insurance company did not invoke the pro rata provision of the "other insurance" clauses, the court's subsequent comments would appear to be no more than dicta. The court stated that the pro rata provision would not apply because the policies were not "identical" in scope, Tolson's was the primary policy, and the two policies issued to Wilkes were secondary. It was at this juncture that the court made its statement that coinsurance of the same risk is a prerequisite to the right of contribution.

Coinsurance problems have usually arisen in South Carolina cases involving fire insurance policies issued to

parties with differing interests, such as mortgagor and mortgagee. In such instances the South Carolina Supreme Court has held that an insurer who had issued a policy to a party having only an equitable interest had no right of contribution from the insurer of the legal interest. *Laurens Fed. Sav. & L. Ass'n. v. Home Ins. Co., supra; Murdaugh v. Traders & Mechanics Ins. Co.*, 218 S. C. 290, 62 S. E. 2d 723 (1950); but see *Edwards v. Great American Ins. Co.*, 234 S. E. 404, 108 S. E. 2d 582 (1959). However, where the same party in interest has procured several fire insurance policies covering the same risk proration will be permitted, provided the insured has otherwise complied with the terms of the policies. *Wynn v. Caledonian Ins. Co.*, 100 S. C. 47, 84 S. E. 306 (1915); *Cave v. Home Ins. Co.*, 57 S. C. 347, 35 S. E. 577 (1900). See *Graham v. American Eagle Fire Ins. Co.*, 182 F. 2d 500 (4 Cir. 1950).

In the instant case we are of the opinion that there was the equivalent of coinsurance of the same risk insofar as Allstate and Canal are concerned. The requirement for contribution is that the insurers must have insured the same risk and interest, or, as it has been stated, there must exist a common liability upon the same obligation. 29A Am. Jur., *Insurance* § 1718, p. 796. Here there is a common liability shared by Vance and Forrester and, by the same token, by Allstate and Canal. The policies here involved were issued to protect the respective trucking companies against claims such as those arising out of the accident. In this respect both policies insure the same risk against the same event. The anomaly here arises from the fact that Burgess, the agent and servant of both of the insureds, was not covered by either contract of insurance at the time of the accident. However, both Vance and Forrester are liable in tort for the injuries caused by Burgess and each policy protects the insured named therein against all sums which it is legally obligated to pay within policy limits. Since Vance has contracted for greater protection, its insurer, Allstate, is liable in proportion to the amount which the protection it provided bears to the total protection provided by both policies.

Affirmed.

**ORDER DENYING PETITION FOR REHEARING**

Upon consideration of the Petition for Rehearing filed by the appellants, Vance Trucking Company, Inc., and Allstate Insurance Company, on May 31, 1968, it is

ORDERED that the petition be, and the same is hereby, denied.

FILED
June 20, 1968

SAMUEL W. PHILLIPS,
Clerk

s/ SIMON E. SOBELOFF,
United States Circuit Judge,

s/ HERBERT S. BOREMAN,
United States Circuit Judge.

A True Copy, Teste:
SAMUEL W. PHILLIPS, Clerk,
By: BEVERLY M. NEWELL,
Deputy Clerk

**ORDER STAYING MANDATE**

Upon the motion of the appellants by their counsel, and for cause shown,

It is ordered that the mandate in the above case be, and it is hereby, stayed pending application of the appellants for a *writ of certiorari* to this Court, provided the application is filed in the Supreme Court of the United States within 30 days from June 20, 1968.

s SIMON E. SOBELOFF,
United States Circuit Judge.

FILED
June 27, 1968,

SAMUEL W. PHILLIPS,
Clerk

A True Copy, Teste:
SAMUEL W. PHILLIPS, Clerk,
By: MARGARET L. DAVIS,
Deputy Clerk

## JUDGMENT

This action came on for trial before the Court and a jury, Honorable Charles E. Simons, Jr., United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff, Robert H. Carson, Administrator of the Estate of Annie Barbara Carson, deceased, recover of the defendants, Vance Trucking Lines, Inc., and Forrester Trucking Company, Inc., the sum of Eighty Five Thousand and no/100 ($85,000.00) dollars, actual damages.

Dated at Greenville, South Carolina, this 19th day of June, 1968.

MILLER C. FOSTER, JR.,
Clerk of Court,

By: EDITH W. THOMAS,
Deputy Clerk.